

# **2020 DOMESTIC VIOLENCE VIRTUAL CONFERENCE**

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## **Evidence of Prior Bad Acts in Intimate Partner Violence Cases**

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## **Evidence of Prior Bad Acts in Intimate Partner Violence Cases**

### **2020 Domestic Violence Virtual Conference**

#### **Arizona Prosecuting Attorneys' Advisory Council**

Cases of intimate partner violence, including domestic and sexual violence, stalking, or human trafficking, often have relevant evidence of “prior bad acts.” The term “prior bad act” is a term of art and a type of character evidence. They are covered under the Arizona Rules of Evidence, specifically in Rule 404(b). Rule 404(b) states:

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Utilizing this type of evidence is often critical to proving your case and painting a full picture for the judge or jury. What is commonly referred to as 404(b) evidence, is often viewed with great caution by trial and appellate courts, because of the perceived risk that juries will convict the defendant based upon evidence that (s)he committed some crime other than the one charged, or that the defendant is a “bad person” and therefore probably guilty of the charged crime. A review of federal court opinions show that Rule 404(b) has generated more reported decisions than any other provision of the Federal Rules. If the courts view such evidence with caution, so must the prosecutor. However, with careful preparation and presentation prosecutors can confidently seek to admit such evidence for a proper purpose.

This document introduces some of the circumstances in which evidence of other crimes and bad acts may be useful in proving your case and the legal theories under which such evidence may be admissible. Admissibility is governed by the Arizona Rules of Evidence and various case decisions. Permissible theories of admissibility and the purposes for which the evidence can be admitted has been the subject numerous cases. Some evidence may be admissible on multiple grounds.

This document will not fully cover all Arizona case law or provide a comprehensive list of every type of evidence that may be utilized. I encourage you to refer to the Prosecutors' Manual and other resources found on [apaac.az.gov](http://apaac.az.gov) for a more complete review of the law in this area.

The general rule is evidence of other crimes or bad acts is not admissible to prove the defendant committed the crime charged.<sup>i</sup> The rationale is if bad acts are admitted to show the defendant is a bad person, the jury may convict on lesser evidence.<sup>ii</sup>

#### **Domestic Violence Cases**

In prosecuting an intimate partner violence case, one beneficial strategy is to establish the history of abusive behavior, dominance, and control by the defendant that led to the criminal

act. Some of the reasons you may want to introduce 404(b) evidence in a domestic violence case include:

1. It may provide greater context for the current crime as part of a pattern of abuse. Many abusers escalate from emotional/psychological violence to physical violence. Evidence of prior assaults against an intimate partner can demonstrate the context in which a particular assault occurred, which is necessary to understand the extent of the victimization, as well as the perpetrator's intent.
2. It helps the jury understand why the crime happened and to explain otherwise inexplicable or confusing criminal acts or dynamics between the victim and the defendant.
3. It may help you overcome victim-blaming biases exploited by the defense. This strategy is particularly effective when accompanied by expert testimony explaining the effects of the violent history on the victim's behavior.
4. It helps establish the requisite purpose, intent, or knowledge that is an element of the offense.
5. It strengthens evidence-based prosecutions where a victim is unable or unwilling to participate in the prosecution of the abuser, or recants statements from the original complaint, by showing that the victim has reason to fear the defendant or that the defendant has historically manipulated the victim.

### **Sexual Violence Cases**

When sexual violence involves intimate partners, many of the relevant purposes will include those described above. Sexual violence is often part of the overall pattern of power and control. In both intimate-partner sexual assaults defendants will often assert consent as a defense. Evidence of other acts can be helpful to overcoming this defense by establishing the perpetrator's plan, intent, or preparation for the assault. Some of the reasons you may want to introduce 404(b) evidence in a intimate partner sexual violence case include:

1. To establish evidence of the defendant's intent or plan. For example, assaults involving the same plan to offer an intoxicated victim a ride home after friends have left the victim alone with the defendant at a bar helps to show that this was a purposeful plan.
2. To establish the elements of force or absence of consent by linking the perpetrator's abuse of the victim on other occasions to the victim's "submission" to penetration or other sexual contact in the present case.
3. To establish that the defendant has knowledge of the effects of drugs or alcohol as a tool of victimization.

4. To establish that the defendant selected the victim for particular reasons, such as to exploit known vulnerabilities.

Other examples allowed under Arizona Rules of Evidence may include:

### **Motive**

To show the reason behind the perpetrator's behavior. Examples could include:

- Prior verbal threat to "make the victim not so pretty" where assault caused serious physical injury or disfigurement.
- Prior beatings or threats with accusations of infidelity.

### **Opportunity**

To show the defendant had the means to commit the charged act such as possessed a weapon or created circumstances that facilitated the crime. Examples could include:

- Pointing a gun at someone else, shortly before shooting victim.
- Theft of victim's cell phone or disabling a means of escape.
- Purchase of drugs later used to facilitate sexual assault of victim.

### **Intent**

To show the perpetrator's intent to inflict a specific type or degree of harm. Examples could include:

- Prior assaults against the victim, to disprove claims of self-defense or of protecting the victim from self-harm.
- Prior severe assault against victim, to prove intent in subsequent attack that was interrupted by police response or third-party intervention.

### **Preparation, Plan or Knowledge**

To show evidence of steps taken to accomplish the crime against the victim or knowledge about the victim or the harm that would result. Examples could include:

- Stalking of victim to determine victim's location or living arrangements as part of plan to break into victim's home.
- Prior strangulation of a victim to show defendant knew victim would be rendered unconscious.
- Rape/assault of the victim as part of plan to isolate and control victim for sex trafficking.

### **Identity**

To show the other act and charged crime have some uniquely identifiable characteristic or are signature crimes that point to the defendant. Examples could include:

- Use of identical, uniquely identifiable weapon.
- Other crime had signature elements such as identical words, unique behavior, highly distinctive characteristics. Mere similarity or common characteristics usually are insufficient.

### **Absence of Mistake or Accident**

To show the defendant was not mistaken about facts or circumstances otherwise justifying, excusing, or mitigating the offense. You may also use this type of evidence to show harm to the victim was not accidental. Example could include:

- Prior assaults to show victim's injuries were not result of accidental contact.
- Prior assaults to show defendant not mistaken as to need for self-defense.

Any time you anticipate introducing evidence of prior bad acts, a pretrial Motion in Limine should be filed, regardless of whether the rule, statute, or case law explicitly requires it. By carefully briefing the issue for the trial court, you will be forced to think through and articulate the basis, or bases, for admitting the evidence. Further, the court will have the time to research the issue if necessary and to carefully consider the arguments before rendering a decision. Attempting to present 404(b) evidence without a preliminary ruling from the court increases the risk of mistrial or reversal on appeal. Your motion should assert all potentially applicable grounds for admission, including as many of the "purposes" under Rule 404(b) as may be applicable. Further, the motion should seek from the court a ruling on each of the grounds. Often judges will determine the evidence is admissible on a single ground and therefore not consider others. By requesting a ruling on each of the grounds for admission, an appellate court will have a complete record of the court's rulings and reason for each proffered argument.

Four main provisions of the Rules of Evidence determine when 404(b) evidence will be permitted:

1. Rule 404(b) requires that it be for a proper purpose.
2. Rule 402 requires that it be relevant to the charge at issue.
3. Rule 403 requires that prejudicial nature not outweigh its probative value.
4. Rule 105 requires that the judge give a limiting instruction upon request.<sup>iii</sup>

It is important to note that the other purposes listed in rule 404(b) is not exclusive. If evidence is relevant for any purpose other than that of showing the defendant's criminal propensities, it is admissible even though it refers to prior bad acts.<sup>iv</sup>

There are many common objections to the admissibility of 404(b) evidence. They often include the evidence is of different conduct or relates to different circumstances. Frequently, defense attorneys will object to admissibility based on an argument that the conduct or occurrence is

too remote in time or not offered for one of the specific named purposes. The catch all defense argument is that the evidence you seek to admit is more prejudicial than probative.

Overcoming these objections, and protecting the record for appeal, rests on analyzing, arguing and receiving a ruling on every admissible ground.

Sometimes judges will allow evidence but only for limited purposes. When evidence of other bad acts is admissible for a limited purpose, a limiting instruction is appropriate. This will ensure the jury does not consider it for an impermissible purpose, such as propensity. Even if the defense fails to request a limiting instruction, you should consider making the request to protect a conviction on appeal.

Evidence of prior bad acts is often present in cases of intimate partner violence. It is critical that you spend time analyzing this type of evidence. Your analysis should include identifying every possible reason the evidence can, and should, be admitted. Making these determinations and forming your arguments is not only part of preparing your case, it is part of understanding the defendant, your victim and the crime.

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<sup>i</sup> *State v. Correll*, 148 Ariz. 468, 715 P.2d 721 (1986).

<sup>ii</sup> *State v. Swinburne*, 116 Ariz. 403, 569 P.2d 833 (1977).

<sup>iii</sup> *State v. Coghill*, 216 Ariz. 578, 169 P.3d 942 (2007).

<sup>iv</sup> *State v. Tuell*, 112 Ariz. 340, 541 P.2d 1142 (1975).